

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2018

Public Authority: Department of Justice
Address: foi@justice-ni.x.gsi.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Justice ("DOJ") relating to employees of the Northern Ireland Civil Service ('NICS') who were dismissed due to inefficiency sickness within a specified period of time. The DOJ applied section 40(2) of the FOIA as a basis for non-disclosure of some of the information ('the withheld information').
2. The Commissioner's decision is that the DOJ has correctly applied the above exemption to the information not disclosed to the complainant. The Commissioner has also decided that the DOJ has not complied with section 1(1)(a) of the complainant's request.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 24 October 2017, the complainant wrote to the DOJ and requested information in the following terms:

"I would like to request how many people Department by Department have been dismissed due to inefficacy sickness record. I would like to have this broken down to disabled and non-disabled. I would also like disabled staff to be broken down into percentages of chronic illness, i.e. fibromyalgia M.E and so on and also neurological conditions such as MS."

5. The DOJ responded to the complainant on 10 November 2017, stating that it did not hold the requested information in full, it only held records of the reason for dismissal, e.g. inefficiency sickness, which it provided to the complainant. It provided the complainant with the number of employees who were dismissed during the specified period for inefficiency sickness, i.e. four.
6. On 20 November 2017, the complainant asked the DOJ to reconsider the request on the following grounds:-

"If a case is sent to a tribunal where a disabled person has been dismissed under *inefficiency sickness* due to absences through disability there has to be scope for a comparison against non-disabled- if no record of this is recorded then no comparison can be given in tribunal if a disabled person feels that their dismissal is unfair- this information not being collected leaves them at a disadvantage to compare to a non-disabled person."
7. The DOJ carried out an internal review, the result of which was provided on 4 December 2017. The reviewer stated that, whilst it was accepted that the withheld information was not held by it in electronic format, the DOJ had failed to consider whether the information may be held in employees' hard copy HR files. The reviewer stated that, if information within the scope of the complainant's was contained in those files, it would be withheld under section 40(2) as it was sensitive personal information of individuals, from which they could be identified.
8. The complainant contacted the Commissioner on 14 December 2017 to complain about the way his request had been handled.

Scope of the case

9. The Commissioner has considered the DOJ's handling of the complainant's request and in particular its application of section 40(2) of the FOIA to the withheld information.
10. After the Commissioner had requested the DOJ's submissions as to its handling of the complainant's request, the DOJ wrote to the Commissioner on 9 August 2018. That letter stated that, in relation to the four employees who had been dismissed for inefficiency sickness during the specified period, the DOJ does hold some information within the scope of the complainant's request regarding disabilities of relevant employees. That information is held in both hard copy and electronic format and the Commissioner has viewed copies of the information.

Reasons for decision

Section 40(2) of FOIA – personal information of third parties

11. Section 40(2) of FOIA states that information is exempt from disclosure if it constitutes personal data and either the first or the second condition in section 40(3) is satisfied. The first condition in section 40(3) states that the disclosure of personal data would (i) contravene any of the data protection principles, or (ii) section 10 of the Data Protection Act 1998 ("DPA"). In this case the DOJ has explained that it considers that disclosing the withheld information to the complainant would be unfair and would breach the first data protection principle. Therefore, this satisfies the first condition in section 40(3) of FOIA. The DPA 1998 has since been superseded by the General Data Protection Regulation ('GDPR') and the Data Protection Act 2018, however the Commissioner has considered the DOJ's handling of the complainant's request at the actual time of the request, which was before the GDPR and Data Protection Act 2018 were in force.
12. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into possession of the data controller.
13. The Commissioner considers that the information withheld under section 40(2) is personal data, as it consists of information relating to former employees of the NICS, who are living individuals and could be identified from the information, as only a small number of employees were dismissed during the specified period, it is likely that it is known that they were dismissed and any further information regarding disabilities, reasons for dismissal etc may make it easier to identify them.

Would disclosure of the withheld information be unfair?

14. The Commissioner has considered whether the disclosure of this information would be fair. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individuals' reasonable expectations of what would happen to their information;

- the consequences of disclosure, (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Reasonable expectations of the data subject

15. The DOJ explained that the withheld information contains sensitive personal information (to do with their physical health) relating to former employees of the NICS. It considers that those individuals would not expect sensitive personal information, which they had provided voluntarily and is held by the NICS on their HR files, to be disclosed into the public domain.

Would disclosure cause damage and distress to the data subjects?

16. The DOJ has informed the Commissioner that it is unable to seek the consent of the data subjects, as it does not have their current contact details, so the Commissioner has no first-hand indication of whether damage or distress would be caused to the data subjects by disclosure of their personal information.
17. However, having viewed the withheld information the Commissioner considers that, due to the reasonable expectations of the data subjects in this situation, disclosure of the withheld information and the likelihood of identification of individuals from this would constitute an intrusion into their privacy, which would be likely to cause them some degree of distress, given the nature of the information. The Commissioner has gone on to consider whether this intrusion would be unwarranted, or whether there is any legitimate interest in disclosure of the data subjects' personal information.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

18. In cases where complying with an information request would involve disclosing personal data, the Commissioner will always be mindful of the importance of protecting the privacy of individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a compelling interest in disclosure which would make it fair to do so.

19. The Commissioner has considered whether there is any wider legitimate interest in the disclosure of the information in question. Clearly disclosure is of interest to the complainant, however the Commissioner cannot see any wider legitimate interest which would outweigh the rights and freedoms of the individuals.
20. The Commissioner, having considered all aspects of the complainant's request and the DOJ's response, concludes that it would be unfair to disclose the withheld information and that no legitimate interest exists in favour of disclosure which would outweigh the rights and freedoms of the data subjects involved.

Section 1(1) of the FOIA

21. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled-

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

22. The Commissioner considers that the DOJ has failed to comply with section 1(1)(a) of the FOIA as it did not inform the complainant in its initial response or internal review whether it definitely held information within the scope of the complainant's request.

Right of appeal

23. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Deirdre Collins
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